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SUPREME COURT OF THE UNITED STATES

No. 197

OCTOBER TERM, 1937.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS AT BEAUMONT.

Howth, Adams & Hart,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS AT BEAUMONT.

To the Honorable the Supreme Court of the United States:

The petition of Estaban Adam, petitioning from a final judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas (at Beaumont), affirming the judgment of a district court of Jefferson County, Texas, sustaining a general demurrer to petitioner's first amended original petition and dismissing his cause of action against the statutory trustees and stockholders of Beaumont Export & Import Company, respectfully shows to this Honorable Court:

I.

SUMMARY OF MATTER INVOLVED.

1. The petitioner brought this suit against the respondents in the District Court of Jefferson County, Texas, to establish and recover on a final, valid and unsatisfied judgment rendered by a Superior Court of Los Angeles County, California.

He claimed in his pleading in the trial court, and asserted at every step in exhausting his remedies provided by the law of Texas in his appeals to all of her courts having jurisdiction of the cause of action, his constitutional right to require the Texas courts to give said California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States.

The manner in which this claim of right—this federal question—was expressly raised and presented throughout the whole cause is shown in detail under the heading of Jurisdiction, paragraph 3 of the supporting brief (page 25).

2. The California judgment arose out of the following facts:

On May 31, 1929, the Beaumont Export & Import Company, a corporation created under the laws of Texas, voluntarily entered and submitted itself to the jurisdiction of a Superior Court of Los Angeles County, California, a court having general jurisdiction under the laws of said state (paragraph 2 of the petition, R. 2 and 3).

and filed therein its suit against Rodolfo Montes for the sum of six thousand forty-three and 37/100 dollars ($6,043.37), the alleged purchase price of certain goods and merchandise.

Montes answered thereto and later, with the express permission of the court, filed his cross-action against the said plaintiff corporation for alleged unlawful conversion of the said goods and merchandise of the alleged value of five thousand dollars ($5,000.00), for which said amount the judgment by default herein sued upon was rendered in his favor against Beaumont Export & Import Company (paragraphs 1 and 2, R. 1 and 2; Exhibit A to petition, R. 21 to 24; Exhibit D to petition, R. 26 and 27).

Sometime after the filing of the said suit in the California court and while it was still pending, the Beaumont Export & Import Company was legally dissolved by the voluntary action of its officers, directors and stockholders, and a certificate of such dissolution was issued by the Secretary of State of Texas; and thereupon the then president and directors of said corporation became *ipso facto,* under the Texas laws, the statutory trustees to take charge of and administer the corporate assets as a trust fund for the creditors and stockholders of said company. (Article 1388 of the Revised Civil Statutes of Texas for 1925, copied in appendix.)

The said statutory trustees accepted the trust by taking charge of said corporate assets and have ever since been in possession thereof (paragraph 17 of petition, R. 14 and 15).

Wherefore, the said statutory trustees and stockholders were made defendants (respondents here), in this suit.

Estaban Adam, the plaintiff in the trial court and the petitioner here, by purchase for valuable consideration, became the legal and equitable owner of said California judgment (paragraph 15 of petition, R. 13).

3. The following is a condensed statement of the allegations of petitioner's first amended original petition, to which the District Court of Texas sustained a general demurrer and dismissed the cause of action:

(a) That the judgment entered by the Superior Court of California in favor of Montes on his cross-action against the Beaumont Export & Import Company was a final and not an interlocutory judgment, under the laws of California (paragraph 4 of petition, R. 4);

(b) That proper, legal and personal service, as required by the laws of California, was obtained on the Beaumont Export & Import Company by serving a true copy of the cross-complaint and order of the court permitting the filing thereof upon the company's then attorney of record, Richard F. Bailey (paragraph 5 of the petition, R. 4, 5 and 6);

(c) The statutes of California and the construction thereof by the decisions of the California courts of last resort (citing the decisions), relating to and providing the manner in which service must be made upon the opposite party on a cross-complaint were expressly plead (paragraph 8 of the petition, R. 8; and paragraph 24 of

the petition, R. 17 and 18). It was expressly alleged that the decisions of the courts of last resort of the State of California, in construing the statutory provisions set out in the petition, hold that proper legal service may be made of a cross-action on the adverse party by serving his attorney of record in the manner stated, to-wit, by making service of the papers or instruments either by delivering same personally to the attorney of record for the adverse party, or, in the alternative, if it is made during the attorney's absence from his office, by leaving the notice or other papers with his clerk therein or with the person having charge thereof, etc., and that the said service was made on the cross-action filed by said Montes in said California court on the said Richard F. Bailey as attorney of record for Beaumont Export & Import Company while the cause of action filed by said Texas corporation was still pending therein (R. 8 and 9; and Exhibit B to the petition, R. 24);

(d) That the said service obtained on the Beaumont Export & Import Company, through said service made upon its duly authorized attorney of record, started or set in motion the running of the time within which the said corporation was required to answer, as expressly provided by the laws and decisions of the State of California; which said laws and procedure provided that a default judgment may be entered for failure to answer and plead to such cross-complaint upon the service aforesaid (paragraph 2 of petition, R. 2 and 3); and, therefore, the said court of California, as a basis for and as a condition precedent to rendering the judgment on

the cross-action aforesaid, had thus acquired actual and personal service of notice within its jurisdiction upon the said Beaumont Export & Import Company while the said company and its duly authorized attorney of record were both within the territorial jurisdiction of said court (paragraph 2 of petition, R. 3);

(e) The time within which the laws of California required the Texas corporation to answer having expired, and no answer in its behalf having been filed to said cross-action, the attorneys for Montes filed of record notice that on a certain day and at a certain hour they would move the court for an order to enter the default of the said Texas corporation for failure to appear and answer or plead to the said cross-complaint, and thereupon duly served upon the said Richard F. Bailey a true copy of such notice and the said Bailey acknowledged receipt thereof by signing the original (paragraph 5 of petition, R. 4 and 5). Said Bailey failing to appear at the time and place stated for a hearing on the motion for a default judgment, he was again notified and given ample opportunity to answer thereto, and at Bailey's request the hearing on said motion was continued to another date set, and thereafter another continuance thereof was granted at his request, and finally on May 24, 1933, judgment in favor of the said Montes against the Beaumont Export & Import Company on said cross-action was duly rendered and entered by the court (paragraph 5 of the petition, R. 5 and 6);

(f) Having been again notified of the entry of said judgment by the clerk, the said Richard F. Bailey on

the 15th day of November, 1933, served notice upon the attorneys of record for Montes that on the 23rd day of November, 1933, at a certain hour and place, that the Beaumont Export & Import Company would move said court for its order setting aside the default entered on the 24th day of May, 1933, and for permission to file its answer served therewith, stating that the said judgment was entered against the Texas corporation "through the mistake, inadvertence, surprise or excusable neglect of plaintiff and cross defendant's counsel," and that said motion would be based upon the affidavits of certain persons named and filed therewith (paragraph 6 of the petition, and various exhibits mentioned therein, R. 6 and 7);

(g) All of the fact issues relating to whether or not legal and personal service, as required by the statutes and decisions of California had been obtained against the Texas corporation on said cross-action, were thereupon litigated before the California court on said motion to set aside the default judgment, and both parties adduced evidence in the form of affidavits bearing on said fact issues, and the court having found and determined all of said issues in favor of Montes and against the Texas corporation, the question of whether or not there was proper legal service of the cross-action became *res judicata* and binding upon the parties thereto, who were estopped to assert the contrary (paragraphs 6 and 7 of the petition, R. 6 and 7; and paragraph 9 of the petition, R. 9 and 10);

(h) On the 15th day of September, 1930, the Beaumont Export & Import Company was legally dissolved by vote and consent of its officers, directors and stockholders

and a certificate of dissolution duly issued by the Secretary of State of the State of Texas (paragraph 16 of the petition, R. 13), and at the time of its dissolution William Saenger was its president and its directors were: William Saenger, P. P. Butler, W. H. Garretson, H. A. Perlstein and Charles H. Weinbaum, and that the said president and directors thereupon became, under the laws of Texas, and still are, trustees of the creditors and stockholders of said Beaumont Export & Import Company, and were, as such trustees, and by virtue of their actual acceptance of the trust, and no receiver ever having been appointed, invested with all the power and authority as expressly provided by the statutes, laws and decisions of the State of Texas, and that they have thus had and exercised full charge, control and possession of the assets belonging to said company, of the alleged value of one hundred forty-two thousand five hundred dollars, ($142,500.00) (paragraph 17 of the petition, R. 14);

(i) The legal life of the Beaumont Export & Import Company was, under the laws of Texas, after its dissolution, extended for a period of three years thereafter, with the power and authority to sue and be sued, and that during the said three-year period from September 15, 1930, the date of its dissolution, the said statutory trustees and the corporation were legally identical with respect to the said service had on the cross-action in the California court and with respect to the authority of Richard F. Bailey to represent them in said court, and that his authorized acts in requesting and obtaining two continuances and postponements of the hearing of the motion to enter

judgment by default, operated as a waiver against the statutory trustees and the corporation of any alleged defect or lack of original service obtained on the cross-action (paragraph 13 of petition, R. 12);

(j) That after the said voluntary dissolution of the Texas corporation, its statutory trustees continued to prosecute the cause of action filed by the Beaumont Export & Import Company before its dissolution against the said Montes, permitting the said cause of action to remain on the docket of said court, and retained and authorized the said Richard F. Bailey as their attorney to enter their appearance in the said California court and to file in the name of the Beaumont Export & Import Company their motion to set aside the default judgment and to litigate therein the fact issues relating to the validity, under the California law, of the original service on the cross-action, and that they thereby waived any defect of service (paragraph 13 of petition, R. 12), and were estopped to assert any lack of service by the judgment of the California court after full hearing of evidence on the fact issues, denying the motion to set aside the default judgment against the Beaumont Export & Import Company, and that the said judgment was *res judicata* of all issues actually litigated and that could or should have been litigated in said trial (paragraphs 11 and 12 of petition, R. 11 and 12);

(k) On the 15th day of September, 1933 (three years after the dissolution), the Beaumont Export & Import Company became defunct and not authorized by the law of Texas either to sue or be sued (paragraph 9 of petition, R. 9), and thereafter, to-wit, on the 15th day of November, 1933, the said statutory trustees of the Beaumont Export & Import Company authorized and directed

the said Richard F. Bailey to file a motion in the name of the Beaumont Export & Import Company to set aside the said judgment on the cross-action, as heretofore alleged, and thereby either wilfully or inadvertently perpetrated a fraud upon the said California court in designedly or negligently concealing from the said court and from the said Montes and his attorneys, and in failing to make known to them the fact that the said corporation had been dissolved for a period of more than three years prior to the filing of said motion, and that thereby the said statutory trustees became and were the real parties in said suit and motion to set aside the default judgment and prosecuted and defended as aforesaid in the name of the Beaumont Export & Import Company merely as a convenience for themselves and for their own benefit or for the joint benefit of themselves and the other stockholders of said corporation, and are estopped to assert the contrary (paragraph 11 of petition, R. 11).

4. The said statutory trustees retained the said Bailey and authorized him to enter their general appearance in the said California court, to file their motion in the name of the Beaumont Export & Import Company to set aside the default judgment and for an order of the court permitting them to file their answer to the said cross-action, and authorized their said attorney to litigate all issues arising out of or pertaining to said motion; and the motion duly filed and the notice thereof given by the said Bailey in pursuance of his authority, as alleged in the petition, and as shown by the record in the California court, among other things stated:

> "Said motion will be made on the following grounds, to-wit: That said judgment was entered against plaintiff and cross defendant by mistake, inadvertence, surprise or excusable neglect of plaintiff's

and cross defendant's counsel" (paragraph 6 of petition, R. 6 and 7; and Exhibit G to petition, R. 28 and 29).

The affidavit attached to the answer filed by Bailey to said cross-complaint, in pursuance of his said authority from his clients, contained the following:

> "Richard F. Bailey, being duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export & Import Company, a Texas corporation," etc. (R. 35.)

5. On the said motion filed by the Beaumont Export & Import Company to set aside the default judgment against it, issue was joined by both parties and all of the fact issues relating to whether or not proper service and notice, as required by the laws of California, had been obtained upon the Beaumont Export & Import Company through its attorney of record, Bailey, were duly litigated before the said Superior Court of California by the introduction in evidence before the court by both parties of affidavits of various witnesses in support of their respective contentions. (Petition, paragraphs 6 and 7, R. 6 and 7; affidavit of Richard F. Bailey, Exhibit H, R. 29 to 31; affidavit of Adolph H. Levy, Exhibit I, R. 21 and 32; affidavit of Lucile Holder, Exhibit J, R. 32 and 33; affidavit of W. M. Eggeman, Exhibit L, R. 36 and 37; affidavit of Clore Warne, Exhibit M, R. 38 to 43; counter-affidavit of Richard F. Bailey, Exhibit N, R. 43 to 45; counter-affidavit of Clore Warne, Exhibit O, R. 46 and 47.)

The California court having heard and considered the above evidence on the fact issues tendered and litigated by the parties, found the facts against the Beaumont Export & Import Company and overruled its motion to set aside the default judgment, and the court thereby found and

determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service, under the laws and decisions of California, in favor of said Montes and against the said corporation. (Petition, paragraph 9, R. 9 and 10; order of court denying the motion to set aside default judgment, as shown in Exhibit P, R. 47; and as shown by entry on the court docket as of December 12, 1933, R. 49.)

6. Said Court of Civil Appeals of Texas disposed of the whole case before it by attempting to construe the statutes and decisions of California relating to what the laws of that state required as to service on a cross-action, in the circumstances alleged in the petition, erroneously holding that the Texas corporation was not within the jurisdiction of the said California court, and that, therefore, it was necessary, under the California laws in order to meet the requirements of legal service, that a citation be issued and served personally upon the corporation, and in so holding that court ignored and disregarded the allegations of the petition showing that the Beaumont Export & Import Company was at all times present and within the jurisdiction of the California court through Bailey, its duly authorized attorney of record, and in filing in said court its cause of action against Montes; that for said reasons the Beaumont Export & Import Company was thus at all times present and within the jurisdiction of said court until it became defunct on the 15th day of September, 1933, by virtue of the Texas statutes extending its corporate existence for three years from its dissolution; and that thereafter its statutory trustees voluntarily submitted themselves to the jurisdiction of said court through their attorney, Bailey, whom they authorized to enter their general appearance in the name

of the corporation to set aside the judgment aforesaid (Opinion by Court of Civil Appeals, R. 67, 68).

Notwithstanding the case was before the Court of Civil Appeals exclusively on the sustaining of the general demurrer, that court presumed to find as a fact that neither the Texas corporation nor its statutory trustees ever voluntarily submitted themselves to the jurisdiction of the California court through Bailey, their attorney of record, though the allegations of the petition and the records of said cause in the California court affirmatively show the contrary. On this point the court, in its opinion, said:

> "It is well settled that a judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode recognized as sufficient and valid by the laws of the state where the judgment was rendered" (court's opinion, R. 70).

In this statement the court properly holds, at least by necessary implication, that if the corporation or its statutory trustees "appeared in the action by authorized attorney," such voluntary appearance would *ipso facto* give the court jurisdiction.

All of the errors hereinafter urged as "Reasons for Allowance of Writ" and all those presented in the attached supporting brief were duly presented by petitioner to all of the Texas courts having jurisdiction thereof, and all of such contentions were overruled and denied. The details of the manner in which all of said issues were duly presented and urged in the Texas courts are shown under the heading of Jurisdiction, paragraph 4, of the supporting brief (page 27).

II.

REASONS FOR ALLOWANCE OF WRIT.

1. The controlling issue in the case, as set forth in the petition and as duly presented to the Texas courts consisting of the District Court, the Court of Civil Appeals and the Supreme Court, was that the said statutory trustees of the dissolved and then defunct Beaumont Export & Import Company, in voluntarily entering and submitting themselves to the jurisdiction of the said Superior Court of California by authorizing their attorney, Bailey, to file a motion to set aside the judgment theretofore rendered by that court, and by the act of their said attorney in filing the said motion in the name of said corporation, and in actually litigating all of the fact issues relating thereto, were bound by the action of the court in determining all of said fact issues against them and in denying their motion to set aside the judgment, whereby the said original judgment on the cross-action and the judgment of the court in denying the motion to set it aside became *res judicata* of all issues that were actually and those that could and should have been litigated therein; and the said statutory trustees were thereby estopped to assert the contrary.

Therefore, the Texas courts erred in refusing to apply the well established principle of *res judicata* and thereby denied petitioner his constitutional right to have his judgment given that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States. Some of the decisions directly in point by the

Supreme Court of the United States and by various State courts of last resort are:

Chicago Life Insurance Company v. *Cherry*, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966,
York v. *State of Texas*, 137 U. S. 15, 11 S. Ct. 9.
Tatum v. *Maloney*, 234 N. Y. Supp. 614.
Grantier v. *Rosecrance*, 27 Wis. 488, (Supreme Court).
Burdette v. *Corgan*, 26 Kan. 102 (Sup. Ct.).
Anderson v. *White*, 32 Wis. 308 (Sup. Ct.).
Hall v. *Wilder Mfg. Co.*, 293 S. W. 760, (Sup. Ct. of Missouri).
Ederheimer v. *Carson Dry Goods Co.*, 162 S. W. 142 (Sup. Ct. of Arkansas).

2. Though petitioner by his briefs and oral argument duly presented the said issue of *res judicata* and estoppel to all of said Texas courts, the said Court of Civil Appeals arbitrarily refused judicially to determine it, but deliberately dodged said issue by wrongfully presuming to construe the statutes and decisions of California as to their requirements for proper service on a cross-action, and by construing the said statutes and decisions differently from the construction the California courts of last resort put upon them, as alleged in the petition, and in concluding that adequate service on the cross-action had not been obtained; and presumably held that for said alleged lack of proper original service, the question of *res judicata* became immaterial. The denial by the Supreme Court of the application for writ of error for want of jurisdiction was, under the Texas laws prescribing the jurisdiction of the Supreme Court, equivalent to an express holding by the Supreme Court that the opinion and judgment of the Court of Civil Appeals were correct

(Article 1728, Section 6, Revised Civil Statutes of Texas for 1925, copied in appendix).

In arbitrarily refusing judicially to determine and apply the said principle of *res judicata* and estoppel, the Texas courts wrongfully deprived petitioner of his constitutional right as a litigant to have the courts expressly to pass on all material issues, when such judicial action is properly invoked. That such is an established right of a litigant has been definitely settled by decisions of the Supreme Court of the United States and of the Supreme Court of Texas, some of these decisions being:

Lawrence v. *State Tax Commission of State of Mississippi*, 280 U. S. 276, 52 S. Ct. 556.

Southern Pacific Co. v. *Walters*, 221 S. W. 264 (Supreme Court of Texas).

Harris County v. *Charlton, County Treasurer*, 243 S. W. 460 (Supreme Court of Texas).

Greathouse v. *Fort Worth & Denver City Ry. Co.*, 65 S. W. (2d) 762, 766 (Com. App. of Texas, Section B).

3. In presuming to construe the California statutes prescribing the mode and manner of obtaining service on a cross-action, and in construing the said statutes differently from what was alleged in the petition to be their construction and application by the California courts of last resort, the Court of Civil Appeals was clearly and erroneously outside the issues before it as presented by the appeal from the sustaining of the general demurrer, for that, the Texas courts do not take judicial cognizance of the laws of other states, but such laws must be alleged

and proved as all other ultimate facts constituting a cause of action; and, therefore, the respondents by their general demurrer admitted the truth of the allegations of the petition setting out the statutes of California and citing the California decisions construing said statutes, and further admitted the truth of the allegations showing proper service on the cross-action in accordance with said California statutes and their construction by the California courts.

Some of the Texas decisions holding that the laws of other states must be alleged and proved as any other facts are:

Porcheler v. *Bronson,* 50 Tex. 555, 561.

American National Bank of Oklahoma v. *Garland,* 235 S. W. 562, 563 (Com. App. of Texas).

Van Natta v. *Van Natta,* 200 S. W. 907, 908, (Texas Ct. Civ. App.), writ of error refused by the Supreme Court of Texas.

Some of the decisions by the Supreme Court of the United States and by the Supreme Court and Courts of Civil Appeals of Texas holding that a general demurrer admits the truth of the allegations stating the law of a sister state and the truth of all other allegations sufficiently plead are:

Hanley v. *Donoghue,* 116 U. S. 1, 6 Sup. Ct. 242, 245.

Reasoner v. *Gulf C. & S. F. Ry. Co.,* 203 S. W. 592 (Sup. Ct. of Texas).

De Everett v. *Henry,* 67 Tex. 402, 3 S. W. 566 (Sup. Ct. of Texas).

Bigham Bros. v. *Port Arthur Canal & Dock Co.,* 97 S. W. 686, 689 (by Sup. Ct. of Texas).

Western Union Telegraph Co. v. *Ashley,* 137 S. W. 1165 (Tex. Ct. Civ. App.) writ of error denied by Supreme Court of Texas.

4. Even if the question of what the California statutes required for proper service on a cross-action had been before the Texas Court of Civil Appeals for its decision, the construction of the California statutes by the Texas Court of Civil Appeals was clearly erroneous, as applied to the instant case, in that, the court indulged in an assumption contrary to fact that the Beaumont Export & Import Company and its statutory trustees were not within the jurisdiction of the California court through Bailey, their authorized attorney of record, whereas, the petition affirmatively alleges and shows that they did voluntarily enter and submit themselves to the jurisdiction of that court through their said authorized attorney, and that thereby they "appeared and authorized an appearance" in said court, and, therefore, came within the exception expressly stated by the Court of Civil Appeals to the general rule that "no state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance" (opinion by Court of Civil Appeals, R. 70).

The general principle covering this point is accurately stated by Freeman in his work on Judgments, in the following language:

> *"If a person authorizes an action to be instituted in another state in his behalf, he becomes thereby subject to any judgment which may be taken against him in that suit. So, a defendant, without going into a state, may submit himself to its jurisdiction by authorizing someone to appear for him there. In such case a judgment subsequently entered is obligatory upon him. Thus, a foreign corporation by making a*

general appearance in an action against it, thereby submitted to the jurisdiction and cannot attack the judgment for lack of jurisdiction over it." *Richardson & Boynton Co.* v. *Utah Stove & Hdw. Co.*, 28 Utah 85, 77 P. 1. See cases cited in support of the text, Freeman on Judgments, Section 1381, at page 2855; also Volume 3, Freeman on Judgments (5th Ed.), Section 1414, at page 2915.

5. The construction volunteered by the Court of Civil Appeals of the California statutes prescribing the requirements of service on a cross-action in that state is contrary to the construction of said statutes by the California courts of last resort as that construction is affirmatively alleged in the petition; and in refusing to adopt and apply the said construction thereof by the California courts of last resort, the Texas Court of Civil Appeals has avoided its duty to give the California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States of the tenor following:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

The above mentioned statutory provisions of California as plead and set out verbatim in the petition, to-wit. Section 442 (R. 18), Section 1011 (R. 8), and Section 1015 (R. 18), comprise all of the California statutory law relating to the requirements for adequate service on a cross-action, and said statutes have been construed as affirmatively alleged in the petition (paragraph 8 of petition, R. 8, and paragraph 24 of petition, R. 17 and 18) by the California courts of last resort to mean that where foreign corporations or residents of another state have entered their appearance through authorized attorney of record in a California court, proper and ade-

quate service may be made on a cross-action against them by serving a copy of the cross-action and notice thereof on such attorney of record. The following decisions by the California courts so hold:

Lowe v. *Superior Court* (S. Ct. of California), 134 P. 190, 165 Cal. App. 708.
Wood v. *Johnston*, 8 Cal. App. 258, 260.
Ritter v. *Braash*, 11 Cal. App. 258, 104 P. 592.
Farrar v. *Steenbergh*, 173 Cal. Rep. 94, 159 P. 707.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari issue in usual form directed to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont commanding that court to certify and to send to this court for review a full and complete transcript of the record and all proceedings in cause numbered and entitled on its docket No. 2988, Estaban Adam, appellant, vs. William Saenger, *et al.*, appellees, and that the judgment of said Court of Civil Appeals be reversed and rendered as to the issue of whether or not the first amended original petition to which the general demurrer was sustained by all the Texas courts states a cause of action, in accordance with the foregoing petition for certiorari, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just.

M. G. ADAMS,
Counsel for Petitioner.

I certify that I have examined and am familiar with the contents of the foregoing petition for writ of certiorari; that in my opinion it is well founded and entitled to favorable consideration by the court, and that it is not filed for the purpose of delay.

M. G. Adams.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The judgment of the District Court of Jefferson County, Texas, sustaining the general demurrer to said first amended original petition, dated December 3, 1935, is shown at R. 57-58; but there is no written opinion by the District Court.

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, sustaining the judgment of the District Court, is found at R. 65-71; the judgment rendered by that court on January 28, 1937, at R. 71; but the case is not yet reported.

JURISDICTION.

1. The jurisdiction of this court is based primarily upon U.S.C.A., Title 28, Section 344(b), and specifically upon the fact that petitioner specially set up and claimed his right under the "full faith and credit" clause, Article IV, Section 1, of the Constitution of the United States, and the denial of said right by the Texas courts, as more definitely shown in his attached petition for writ of certiorari.

2. Petitioner exhausted all of his remedies and appellate rights provided by the statutes and laws of Texas, as shown by the following:

After the adverse judgment by the District Court, petitioner perfected his appeal to the Court of Civil Ap-

peals for the Ninth Supreme Judicial District of Texas, this being the court having appellate jurisdiction of said cause (R. 58).

He duly filed his assignments of error, consisting of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Assignments (R. 59-64), by incorporating said assignments of error in a typewritten brief, as provided and permitted by the Texas statute and by the rule of the said Court of Civil Appeals, and filed said brief in the said court within the time provided by law, also presented oral argument, and the said court considered and passed on said appeal, as shown by its opinion (Articles 1844, 1846 and 1757 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix.)

Said Court of Civil Appeals entered its judgment on January 28, 1937, and on February 9, 1937, petitioner filed his application for rehearing (R. 72-74) and his amendment to said application (R. 74-75), which said filing was within the time required by Texas statutes (Article 1877, Revised Civil Statutes of Texas for 1925, copied in the Appendix).

On February 17, 1937, the Court of Civil Appeals overruled said motion for rehearing and the amendment to said motion (R. 75).

The filing of the motion for rehearing being the final remedy in the Court of Civil Appeals, as provided by the Texas statute, the petitioner, on March 13, 1937, filed with the clerk of the said Court of Civil Appeals his application to the Supreme Court of Texas for writ of error and deposited with said clerk a true copy of the application and notified the attorney of record for re-

spondents of the depositing of said copy, as provided by the Texas statutes (Article 1881 of the Revised Civil Statutes of the State of Texas), and the clerk of the said Court of Civil Appeals thereupon, on March 17, 1937, forwarded the original of said application for writ of error to the clerk of the Supreme Court together with the original record of the case and the opinion of the Court of Civil Appeals, etc. (R. 78), and fully complied with the statutory requirements of Texas (Article 1883 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix).

Petitioner's application to the Supreme Court of Texas for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District in said cause, as above shown, was filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing, as provided by Texas statute (Article 1742, Revised Civil Statutes of Texas, copied in Appendix), and the said application fully complied in all respects with the statutory requirements of Texas (Articles 1740 and 1741 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix), and with the rules of the Supreme Court of Texas, prescribing substantially the same requirements.

On March 31, 1937, the Supreme Court entered its order stating that the said application for writ of error "having been duly considered, it is ordered that the application be dismissed for want of jurisdiction" (R. 79).

By the statement "want of jurisdiction" in the order dismissing the application, the Supreme Court did not

mean that it was without jurisdiction of the cause within the general meaning of that term, but merely that it regarded the judgment rendered by the Court of Civil Appeals as correct, but that it was not satisfied that the said opinion in all respects had correctly declared the law, as provided by the Texas statutes prescribing the "appellate jurisdiction" of the Supreme Court, Article 1728, Section 6, and that part of said Section 6 of the tenor following:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; *in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."* (Article 1728, Appellate Jurisdiction of the Supreme Court, Sections 1, 2, 3, 4, 5 and 6, of the Revised Civil Statutes of Texas for 1925, copied in the Appendix.)

On April 14, 1937, petitioner filed in the Supreme Court his motion for rehearing on the application for writ of error (R. 79), distinctly specifying the grounds relied on, and otherwise fully complied with the Texas statute, both with respect to the time of the filing of the motion and the contents thereof (Article 1762, Revised Civil Statutes of Texas, copied in Appendix).

On April 28, 1937, the Supreme Court "after due consideration of the motion" overruled it (R. 80).

Petitioner was accorded no further remedy under the statutes and laws of Texas, and thus by the refusal of

the Supreme Court to exercise its discretionary power to review, the judgment entered by the Court of Civil Appeals became the judgment reviewable in the Supreme Court of the United States. *Bacon* v. *Texas,* 163 U. S. 207, 215, 16 S. Ct. 1023, 41 L. Ed. 132; *Sullivan* v. *Texas,* 207 U. S. 416, 422, 28 S. Ct. 215, 52 L. Ed. 274; *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 472, 477, 36 S. Ct. 625, 60 L. Ed. 1110; "Jurisdiction of the Supreme Court" by Robertson and Kirkham, Section 48, page 84, and cases cited under Note 30.

From said 28th day of April, 1937, therefore, runs the three months' period allowed by law for application to this court for writ of certiorari. 28 U.S.C.A., Section 350; *American Railway Express Company* v. *Levee,* 263 U. S. 19, 44 S. Ct. 11; *Western Union Telegraph Company* v. *Crovo,* 220 U. S. 364, 366, 31 S. Ct. 399, 55 L. Ed. 498; *Norfolk, etc., Co.* v. *Virginia,* 225 U. S. 264, 32 S. Ct. 828, 56 L. Ed. 1082; *Puget Sound Power & Light Co.* v. *County of King,* 264 U. S. 22, 44 S. Ct. 261.

3. The substantial federal question that petitioner was entitled to have the courts of Texas give his judgment rendered by the Superior Court of California that full faith and credit required by Article IV, Section 1, of the Constitution of the United States, was "raised," "specially set up and claimed" and asserted throughout the said cause and at every step of the procedure therein as follows:

In the prayer to his first amended original petition (c) petitioner prayed "that the said judgment be declared and established by this court under the full faith and

credit clause of the Constitution of the United States," etc. (R. 20).

In his first assignment of error (R. 59), and in his ninth and tenth assignments of error (R. 64) filed in the Court of Civil Appeals, he complained and asserted that "the trial court failed to fulfill and comply with its duty expressly prescribed by Article IV, Section 1, of the Constitution of the United States, which was copied verbatim (R. 59, 64).

A copy of the brief duly filed by petitioner in and considered by the Court of Civil Appeals, certified by the clerk of that court, was attached to the certified record sent to the clerk of the Supreme Court of the United States; and the ten assignments of error appearing in the record now before this court (R. 59-65), are verbatim copies of the said assignments of error contained in said brief, as expressly provided and permitted by Article 1844 of the Revised Civil Statutes of Texas for 1925; said article being copied in the Appendix. This is a substantial compliance with the requirements by the Supreme Court of the United States to show that a federal question was raised and the manner in which it was presented to the state courts. *People of State of New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. 61.

In his application for rehearing in the Court of Civil Appeals, to-wit, in his first, second and fourth grounds thereof (R. 72, 73 and 74), petitioner specifically claimed and asserted that the Court of Civil Appeals in sustaining the judgment of the trial court had failed and refused "to give that full faith and credit to the public acts,

records and judicial proceedings of the State of California required by said Article IV, Section 1, of the Constitution of the United States" (R. 72).

Also in his application to the Supreme Court of Texas for writ of error to the Court of Civil Appeals, to-wit, in his first assignment (R. 75, 76), fourth assignment (R. 77, 78) and fifth assignment of error (R. 78), petitioner expressly claimed and asserted that the Court of Civil Appeals by its judgment had failed and refused to give and had wrongfully denied him his said constitutional right under the full faith and credit clause of the Federal Constitution; copying verbatim the clause under which he claimed said right (R. 76).

Again, in his motion filed in the Supreme Court for rehearing on the application for writ of error he claimed and asserted in his second assignment of error (R. 79, 80) that the Supeme Court in dismissing his application for the writ for alleged want of jurisdiction, and both of the lower courts, as to all of the errors as shown and set forth in said application for writ of error, had erroneously failed and refused to give the said California judgment that full faith and credit as required by said article and section of the Federal Constitution; the specific provision relied on being copied verbatim (R. 80).

4. All of the reasons relied on for allowance of the writ, as shown in Division II of the petition and which are hereinafter adopted as assignments of error, were distinctly raised and asserted throughout all of the proceedings in the Texas courts, as evidenced by the following:

(a) Reason No. 1 relating to *res judicata* was expressly raised in the petition (paragraph 9, R. 9); was urged in the Court of Civil Appeals in the fifth assignment of error (R. 61); was again urged in the second and third grounds of the motion for rehearing in said court (R. 72, 73); was distinctly presented in the application to the Supreme Court of Texas for writ of error in the first assignment of error therein (R. 75, 76); and finally again urged in the Supreme Court in the motion for rehearing on the application for writ of error, in the first and second assigned errors (R. 79, 80).

(b) Reason No. 2 presenting the error of the Court of Civil Appeals in refusing judicially to determine the issue of *res judicata,* was presented at the first opportunity, to-wit, in the application for rehearing in that court in the third and fourth grounds thereof (R. 73, 74); was again urged in the Supreme Court in the application for writ of error, in the third assignment of error therein (R. 77); and finally urged in the Supreme Court in the motion for rehearing on the application for writ of error in the first and second assigned errors thereof (R. 79, 80).

(c) Reason No. 3 relating to the error on the part of the Court of Civil Appeals in attempting to construe the California statutes relating to requirements of service on a cross-action in that state was distinctly raised and presented at the first opportunity, to-wit, in the application for rehearing in that court, and the fifth ground thereof in the amendment to said application (R. 74, 75); was urged in the application to the Supreme Court for

writ of error in the fourth assignment of error therein (R. 77, 78); and finally urged in the motion for rehearing on the application for writ of error in the first and second assigned errors therein (R. 79, 80).

(d) Reason No. 4 asserting error on the part of the Court of Civil Appeals in presuming to find as a fact that the Beaumont Export & Import Company and its statutory trustees were never present within the jurisdiction of the said California court through their said authorized attorney of record, Bailey, and that, therefore, the service had on the cross-action was insufficient, was raised at the first opportunity, to-wit, in the application for rehearing in that court in the first ground (R. 72), and in the fifth ground in the amendment to the original application (R. 74, 75); also urged in the Supreme Court in the application for writ of error in the fourth assignment of error (R. 77).

(e) Reason No. 5 asserting error on the part of the Court of Civil Appeals in volunteering a construction of the California statutes relating to service on a cross-action and in giving a different construction thereof from that by the California court, was raised at the first opportunity in the application for rehearing in the Court of Civil Appeals, to-wit, the fifth ground, as shown in the amendment to the said application duly filed (R. 74, 75); was again urged in the Supreme Court in the application for writ of error, fourth assignment therein (R. 77, 78); and finally in the motion in the Supreme Court for rehearing on the application for writ of error, first and second assigned errors (R. 79, 80).

STATEMENT OF THE CASE.

For brevity, we here adopt the statement made under the heading of Summary of Matter Involved, Section I, of the petition.

SPECIFICATION OF ERRORS.

To avoid repetition, we here adopt as our "Specification of Assigned Errors" to be urged, the "Reasons for Allowance of Writ," as numbered respectively from 1 to 5, inclusive, and set forth under that heading in Division II of the petition.

POINT ONE.

The case at bar is controlled by the general rule of law that if a litigant enters his appearance in court for any purpose other than expressly and exclusively for contesting the court's jurisdiction, he thereby makes his appearance for all purposes and waives any defect or lack of jurisdiction; and that if he makes his general appearance and puts in issue and litigates the jurisdictional facts and whether or not there had been proper service, the ruling and judgment of the court thereon becomes *res judicata*, which operates as a conclusive estoppel against all subsequent denials or litigation thereof.

The pleading and the attached exhibits of the certified record in the Superior Court of California conclusively show that the motion filed by respondents to set aside the judgment was not even for the purpose of contesting jurisdiction, but admitted jurisdiction of the court

and contended merely that the judgment ought to be set aside on account of the excusable neglect of Richard F. Bailey, their authorized attorney of record in said suit. In this motion the only ground for setting aside the judgment was stated as follows:

> *"Said motion will be made on the following grounds, to-wit: That said judgment was entered against said plaintiff and cross defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross defendant's counsel"* (Exhibit G to petition, R. 29).

At the same time the respondents filed their answer to said cross-complaint, in the verification to which appears the following:

> *"Richard F. Bailey, being first duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export & Import Company, a Texas corporation," etc.* (Exhibit K to petition, R. 35).

In *Chicago Life Insurance Company* v. *Cherry*, 244 U. S. 25, 37 S. Ct. 492, the Supreme Court of the United States, in an opinion delivered by Mr. Justice Holmes, stated the law on the point as follows:

> "This is a suit in Illinois upon a judgment recovered in Tennessee against the insurance company, plaintiff in error. They pleaded and set up at the trial that there never was valid service upon them in Tennessee and that the judgment was void. The defendant in error (the plaintiff) showed in reply, without dispute, that the defense was urged in Tennessee by pleas in abatement; that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff; and that the judgment was affirmed by the higher courts. The plaintiff

had judgment at the trial in Illinois, the judgment was affirmed by the appellate court, and a writ of certiorari was denied by the Supreme Court of that state. The insurance companies say that the present judgment deprived them of their property without due process of law.

"The ground upon which the present judgment was sustained by the appellate court was that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.".

The Supreme Court affirmed the judgment, saying:

"If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

Another statement made by the Supreme Court in that decision is applicable to the case at bar, to-wit:

"If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect (of proper party submitting itself to court's jurisdiction) it could not be said to deny due process of law. *The defendant would be free to rely upon his defense by letting judgment go by default. York* v. *Texas*, 137 U. S. 15, 11 S. Ct. 9, 34 L. Ed. 604; *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 35 S. Ct. 87, 59 L. Ed. 220."

Hall v. *Wilder Manufacturing Company* (Supreme Court of Missouri), 293 S. W. 760, was a suit brought

upon a judgment *in personam* rendered by the Supreme Court of New York. The Supreme Court of Missouri said:

> "The error assigned by defendant falls under two general heads. The first is that the trial court erred in sustaining the validity of the judgment rendered by the New York court, it being the contention that the court did not acquire jurisdiction over defendant; and the second is that error was committed in striking out the counter-claim set up by defendant.
>
> "Coming first for consideration in this case is the effect of the fact of express adjudication by the New York court that jurisdiction of the defendant had been obtained in the original suit. The general doctrine, that, in a suit brought in one state upon a judgment rendered by a court of another state, the jurisdiction of the court rendering such judgment may be challenged, is not disputed by counsel for plaintiff. Such is the settled doctrine."

The court then stated that the jurisdiction of the New York court rested upon the fact issue as to whether or not the corporation was doing business in that state and that it was a question of due process of law under the constitution of the United States; and proceeding the court said:

> "Does the express determination of the New York court that it had jurisdiction preclude inquiry into that question here? *The contention is that the express adjudication is res adjudicata and cannot be reopened by the defendant.*
>
> "*It is a principle well settled and of general application that, where a question proper for judicial determination is directly put in issue, and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the question, such decision and determina-*

tion of the question will be deemed final and conclusive upon the parties and their privies, in all further litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside.

"We are bound in a proper case to give effect to the full faith and credit clause of the federal constitution. The defendant having invoked a direct determination of the question of jurisdiction over it in the New York court, had a full hearing upon that question, and, having permitted an adverse decision to stand, we must give to the decision of the New York court upon that question the same effect as would be given to that determination within the State of New York, or the same force and effect as if it had been rendered by a Missouri court. Tootle v. *Buckingham,* 190 Mo. 183, 88 S. W. 619; *Harding* v. *Harding,* 198 U. S. 317, 25 Sup. Ct. 679, 49 Law. Ed. 1066; *Howey* v. *Howey* (Mo. Sup. Ct.), 240 S. W. 450. 455. *The New York court having determined the question upon that evidence, at the instance of defendant, the ruling is not subject to collateral attack here, under the claim that the New York court erred in its opinion. Tootle* v. *Buckingham, supra.*

"The test of jurisdiction is, whether the court has power to enter on the inquiry, and not whether its decision is right or wrong." *Hagerman* v. *Sutton* (Mo.), 4 S. W. 77.

"Having procured the New York court to exercise its power upon the question of jurisdiction over the person of defendant and to enter into an authorized inquiry as to such jurisdiction and directly determine that question before proceeding to judgment upon the merits, the defendant submitted itself to that court for the determination of that question, taking the chance that an adverse ruling, unreversed and not appealed from, would preclude inquiry into the same question when sued upon the judgment in the court of another state.

"If we are going to measure the judgment rendered in the New York court by the rule applicable to a domestic judgment, then the defendant who sought and had his day in court to procure an express adjudication of the question whether the court had jurisdiction over his person, met with an adverse decision on that issue upon the appeal of the plaintiff, and permitted that decision to stand unreversed and without appeal, cannot have that question reopened upon the ground that the court of the other state erred in its opinion upon the facts submitted. In such situation, we must take the judgment of the New York court at the same value as if rendered by one of our own courts. Tootle v. *Buckingham, supra."*

The pleadings in the case at bar show that the judgment rendered by the California court in adjudicating the jurisdictional facts was not appealed from by respondents, but that such adjudication became a final judgment (paragraph 3 of petition, R. 3).

The case of Hall vs. Wilder Manufacturing Company cites and discusses many analogous cases, and the opinion is a thoroughly reasoned discussion on the subject.

In the case of *Ederheimer* v. *Carson Dry Goods Company* (Supreme Court of Arkansas), 152 S. W. 142, a St. Louis firm of merchants sued the appellee in Arkansas, being an Arkansas corporation, on a judgment obtained by appellants against appellee in the Circuit Court of the City of St. Louis, Missouri. The defense was that the Circuit Court, where the judgment was obtained, was without jurisdiction. The appellee alleged that "no service of summons or process in said suit in the Circuit Court of the City of St. Louis, State of Missouri, has ever been had on this defendant," etc.

The appellee filed in the Circuit Court of St. Louis a motion to quash the alleged service, but the motion was overruled. The trial court permitted appellee, over the objection of appellants, to show that it was a non-resident of Missouri; that it is not doing business or authorized to do business in that state; that at the time of service of summons on Ike Felsenthal he was not transacting business for the appellee; and that he was not such an agent of appellee as that service of summons on him in St. Louis would bind appellee. The court found that the Missouri court was without jurisdiction over the person of defendant and that its judgment was void and, therefore, open to collateral attack. But the Supreme Court of Arkansas said:

> *"The record shows that the Circuit Court of St. Louis is a court of general jurisdiction and had jurisdiction of the subject-matter, and the only question presented for our decision is whether or not the finding and judgment of the Circuit Court of Missouri, holding that it had obtained jurisdiction by proper service upon appellee, is res adjudicata.*
>
> "The appearance of the appellee in the Missouri Circuit Court for the purpose of quashing the sheriff's amended return of service of summons in that cause gave that court jurisdiction of the person of appellee for the purpose of quashing service, not only upon the ground stated in the motion, but upon any other ground that the appellee might have presented. The appellee, upon filing the motion to quash the service of summons, could have brought forward any grounds that it saw fit to allege other than that set up in the motion as a reason why service should be quashed. The appellee, having appeared in the Circuit Court of Missouri for the purpose of quashing service, *is estopped, not only from*

setting up the reason for quashing the service alleged in its motion, but also any reasons that it might have set up as grounds for quashing such service. The issue raised by the motion was whether or not the Missouri Circuit Court had jurisdiction of the person of appellee, and it was the duty of appellee, when it questioned that jurisdiction, to bring forward any cause that might have existed showing that the court did not have jurisdiction of the person of appellee.

"Not having brought forward such matters then, it is estopped from taking advantage of them in a subsequent proceeding to test the jurisdiction, and the judgment of the court on that question, whether right or wrong, is not subject to collateral attack on review by the Circuit Court of another jurisdiction.

"The judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or could have been interposed in the suit.

"Until the appearance of appellee in the Missouri court to quash service of summons, no issue was raised by it. It was not before the court at all for any purpose, unless it had been properly served with process; and, while it was the duty of the Circuit Court of Missouri to examine the service to determine whether it had jurisdiction of the person of appellee, there was no issue on that question raised by appellee. But when appellee appeared and moved to quash, it distinctly raised that issue with all the reasons that were, or could have been, urged as to why the Circuit Court had not acquired jurisdiction of the person of appellee.

"As was said in *Newcomb* v. *New York Central & H. R. R. Co.*, 182 Mo. 708, 81 S. W. 1073: 'If the defendant was of the opinion that the return was not sufficient to bring it into court and had confidence in its own opinion, it could have remained away and let the plaintiff take his course; that was

a station in the progress of the case where the law requires the party to rely on his own judgment and take the risk of being sustained in the end.'"

In the case at bar, it should be specially noted that the respondents did not make the contention in the California court that Richard F. Bailey was not their duly authorized attorney of record, either for the purpose of accepting original service on the cross-action or for filing and litigating the motion to set aside the judgment on the cross-action. On the contrary, the motion filed by Bailey in the Superior Court of California to set aside the judgment based it on the express ground that he himself as the duly authorized attorney had been guilty of neglect, but that his neglect in the circumstances was excusable; and all of said questions of fact were put in issue and litigated before that court with the result as heretofore stated.

In *Tatum* v. *Maloney,* 234 N. Y. Supp. 614, it was held that defendants having retained attorneys in another state to appear specially for them in an action against defendants in that state to contest the court's jurisdiction, were bound by the action of such attorney in the conduct of the litigation even though such attorney exceeded the limitation placed upon him by his client and appeared generally. The court held that when a defendant, for the purpose of contesting the court's jurisdiction, appears and submits the matter for adjudication, he is bound by the result; *and that the judgment of the Supreme Court of Mississippi that defendant by moving in the lower court to set aside default judgment thereby makes general appearance and authorizes entry of judg-*

ment against him, was entitled to full faith and credit in the courts of New York under the full faith and credit clause of the Federal Constitution.

In *Grantier* v. *Rosecrance,* 27 Wis. 488 (Supreme Court of Wis.), the Supreme Court of Wisconsin held that filing motion to set aside default judgment on ground that the record did not show legal service upon him or that it showed no service and that the complaint did not state a cause of action constituted a general appearing for all purposes of the suit and that adjudication thereon by the trial court constituted an estoppel on the principle of *res adjudicata.*

In *Burdette* v. *Corgan,* 26 Kan. 102, it was held that defendant must challenge the judgment on the single ground of jurisdiction, otherwise his appearance would be construed as general and for all purposes of the suit.

In the instant case it has been shown that the petition alleges, and the record in the Superior Court of California conclusively shows, that respondents in the case at bar filed their answer to the merits of the cross-action at the same time it filed its motion to set aside the judgment on the cross-action on the single ground that the neglect of its attorney in not answering the cross-action and litigating it at the proper time was, in the circumstances, excusable.

An accurate and complete statement of the law on this subject, with copious citations of supporting cases, is made by the author Beale in his exhaustive work, The Conflict of Laws, in Volume 2, Section 450.9, at pages 1424 and 1425, of the tenor following:

"Res Judicata of Jurisdictional Fact. The judgment of a sister state is presumed to be valid; and if no defect of jurisdiction appears on the record it will be taken as valid in the absence of evidence to the contrary. But evidence will always be admitted to disprove a jurisdictional fact, that is, a fact upon which the judgment of the foreign court was based. Such a fact commonly put in issue is that of domicile.

"Nevertheless, if the jurisdictional fact was litigated by the defendant in the foreign action and found against the defendant, the question of jurisdiction becomes res judicata, and cannot be relitigated; even if in the foreign action it was put in issue by a special appearance to deny jurisdiction, and was relitigated upon that. In Degge vs. Baxter it appeared that plaintiff got judgment against defendant in Virginia, and later brought suit on the judgment in the District of Columbia; the defendant pleaded that the Virginia judgment was rendered without jurisdiction, and the question was litigated, and it was found against the defendant. The plaintiff now sues in Colorado on the judgment rendered in the District of Columbia. The defendant cannot here set up the defense of lack of jurisdiction."

The legal effect of the entering of their general appearance in the California court by the statutory trustees through their authorized attorney, Richard F. Bailey, to set aside the judgment and of litigating the jurisdictional facts and of proper service under the California statute is as stated by Freeman on Judgments, Section 1381, at page 2855, to-wit:

"If a person authorized an action to be instituted in another state in his behalf, he becomes thereby subject to any judgment which may be taken against him in that suit. So a defendant, without going into a state, may submit himself to its juris-

diction by authorizing someone to appear for him there. In such case the judgment subsequently entered is obligatory upon him. Thus a foreign corporation, by making general appearance in an action against it, thereby submits to the jurisdiction and cannot attack a judgment for lack of jurisdiction over it. Richardson & Boynton Co. v. *Utah Stove and Hardware Co.*, 28 Utah 85, 77 Pac. 1."

The jurisdictional facts put in issue, in the case at bar, by the motion to set aside the judgment and the evidence adduced in support of said motion, and the controverting evidence, which were conclusively and finally determined by the court's overruling the motion, are as follows:

(a) Whether said Bailey, as attorney of record for the Beaumont Export & Import Company and for the statutory trustees thereof, had been properly served, as required by the California laws, with a copy of said cross-action.

(b) Whether the said Bailey, in his capacity aforesaid, had been served with notice of the motion filed by Montes and his attorney to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the cross-complaint.

(c) Whether or not the said Bailey's signature acknowledging receipt of a copy of said notice of motion on the 15th day of April, 1933, was his *bona fide* signature, and whether or not he had actually signed the original of said motion and received a copy thereof.

(d) Whether or not the hearing on said motion to enter said judgment by default was continued or post-

poned on two different occasions at the request of said Bailey in his capacity aforesaid; and

(e) All of the fact issues relating to proper service that could and should have been put in issue, litigated and determined by the court in passing upon and rendering its final order in granting or refusing the cross-defendants' motion to set aside default judgment.

The California court having heard all the evidence on the litigated fact issues aforesaid, denied the said motion to set aside the default judgment. (Paragraph 9 of Petition, R. 9, 10; and the various exhibits to petition showing the evidence adduced by both parties in litigating the issue of proper service under the California law, R. 28-33 and R. 36-47.)

By this action the California court found and determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service under the laws and decisions of California, in favor of said Montes and against the said Beaumont Export & Import Company and its statutory trustees and successors, who litigated said issues in the name of the then defunct Beaumont Export & Import Company. Therefore, all of said issues of fact relating to service thereupon became and now are *res judicata* as among the parties, to-wit, Montes and his privies and successors in interest on the one hand, and on the other, Beaumont Export & Import Company and its statutory trustees and successors as named in the petition, all of whom are thereby estopped to assert or maintain anything to the contrary.

POINT TWO.

In evasively refusing expressly to adjudicate and determine the principle of *res judicata* and estoppel, though such judicial action was properly invoked, the Texas courts wrongfully deprived petitioner of a fundamental and constitutional right.

In *Lawrence* v. *State Tax Commission of State of Mississippi*, 280 U. S. 276, 52 S. Ct. 556, the Supreme Court of the United States held that it was the duty of the lower courts, whether state or federal to determine expressly and not by implication the issues properly before them, in the following language:

> *"But the constitution which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this court to inquire whether the decision of said court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."*

The Supreme Court of Texas, in cases other than the one at bar, has established the same principle and declared the identical right of a litigant: *Southern Pacific Co.* v. *Walters* (Sup. Ct. of Texas), 221 S. W. 264; *Harris County* v. *Charlton, County Treasurer* (Sup. Ct. of Texas), 243 S. W. 460; *Greathouse* v. *Fort Worth & Denver City Railway Co.* (Com. App. of Texas), 65 S. W. (2d) 762, 766.

Though petitioner devoted the larger part of his brief filed in the Court of Civil Appeals to this issue of *res judicata* and estoppel, and stressed this point in oral

argument before that court, and complained of the court's refusal to adjudicate this issue in his motion for rehearing therein (third ground, R. 73), and again in his application to the Supreme Court for writ of error specially presented this issue as paramount and controlling of the whole case (first, second and third assignments, R. 75, 77), and finally renewed the said complaint in his motion for rehearing in the Supreme Court (R. 79, 80), the said courts persistently side-stepped, ignored and refused to adjudicate the issue.

POINT THREE.

The Texas courts do not take judicial knowledge of the laws of sister states, but such laws of other states, when relied on, must be plead and proved as any other ultimate facts; and the petition having alleged the statutes of California prescribing the requirements for proper service on a cross-action, and having alleged the construction given to said statutes by the California courts of last resort, the said California laws thereby became necessary ultimate facts to be established by evidence upon trial on the merits; and, therefore, the general demurrer interposed by respondents admitted that the California statutes and their construction by the California courts were as alleged in the petition.

It is an established rule that in a case appealed from a state court, where it is the law of such state that its courts will not take judicial knowledge of the laws of another state involved in the case, the Supreme Court of the United States, in accord with said practice, will also refuse to take judicial knowledge of the laws of such other

state, unless such laws were plead and proved; *and that in such case the general demurrer admits that the laws of the sister state are as alleged in the petition. Hanley* v. *Donoghue,* 116 U. S. 1, 6 S. Ct. 242, 245, *where the Supreme Court of the United States said:*

> *"Whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the laws of that state must be proved like any other matter of fact."*

In *Western Union Telegraph Company* v. *Ashley,* 137 S. W. 1165 (Tex. Civ. App.), writ of error denied by the Supreme Court of Texas, in which the laws of Arkansas relating to the matter involved were plead, the Texas Court of Civil Appeals held:

> *"When appellee obtained a ruling of the court on his demurrer he, in effect, admitted that the law of Arkansas was as alleged by appellant."*

The rule is thoroughly established in Texas, by decisions of the highest courts, that the laws of other states must be alleged and proved as any other facts: *Porcheler* v. *Bronson,* 50 Tex. 555, 561; *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562, 563 (Com. App. of Texas); *Van Natta* v. *Van Natta,* 200 S. W. 907, 908 (Tex. Civ. App.), writ of error refused by the Supreme Court of Texas.

In the case at bar the fundamental question that was before the Texas courts for their adjudication was whether or not the petition stated a cause of action, and this, under the Texas practice, has always been a pure

matter of law: *Reasoner* v. *Gulf C. & S. F. Ry. Co.*, 203 S. W. 592 (by Sup. Ct. of Texas); *De Everett* v. *Henry*, 67 Tex. 402, 3 S. W. 566; *Bigham Bros.* v. *Port Arthur Canal & Dock Co.*, 97 S. W. 686, 689 (by Sup. Ct. of Texas); *Warner* v. *Bailey*, 7 Tex. 517, 518.

POINT FOUR.

The Beaumont Export & Import Company before its dissolution having entered and submitted itself to the jurisdiction of the California court to file and litigate its suit against Montes, and being at all times represented by authorized attorneys of record, both before its dissolution and after its dissolution, during the period of three years for which its corporate life was extended by the laws of Texas, that is, up to September 15, 1933, the date upon which it became defunct, was at all times personally within and voluntarily submitting to the jurisdiction of said California court, and during that time the said judgment was rendered and entered against it. After the said corporation became defunct, the statutory trustees authorized and directed the same attorney, Bailey, to file, in the name of the Beaumont Export & Import Company, a motion to set aside the said judgment and to litigate in said court all the fact issues relating to proper service, etc., and thereby the said statutory trustees personally entered and voluntarily submitted themselves to the jurisdiction of that court for the purposes aforesaid.

The rule that either an individual or a corporation may, without actually entering another state, submit themselves to the jurisdiction of its courts by retaining and authorizing an attorney either to file or defend a suit and become thereby bound by any action or judgment of

the court, is a principle definitely established. Freeman on Judgments, Section 1381, page 2855, also Volume 3, Freeman on Judgments (5th Ed.), Section 1414, page 2915; *Richardson and Boynton Co.* v. *Utah Stove & Hardware Co.*, 28 Utah 85, 77 Pac. 1.

If the rule were otherwise, individuals and corporations, residents of one state could enjoy all the advantages of the courts of another state and be immune and not subject to any of the disadvantages or chances of litigation.

The Supreme Court of the United States has had occasion in *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 37 S. Ct. 283, to consider and determine the nature and effect of the Texas statutes upon dissolved corporations, as follows:

> "It is contended that all suits pending against the Peoples Light Company abated upon its dissolution. As we read the Texas statute such a consequence is carefully avoided. It is there provided that upon dissolution the president and directors shall be trustees of the creditors and stockholders of the corporation, 'with full power to settle its affairs' and with power 'in the name of such corporation to collect all debts, compromise controversies, and maintain or defend judicial proceedings.' *This general language makes no distinction between pending and subsequent judicial proceedings which the trustees are empowered to maintain and defend in the corporation's name; and there seems no reason why such a distinction should be read into the statute. There is also the further provision in the article that 'the existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty to settle its affairs.'*"

This construction of the Texas statutes by the Supreme Court of the United States is in harmony with the construction thereof by the Texas courts of last resort: Revised Civil Statutes of Texas, 1925, Articles 1388-1395; *Burkburnett Refining Co.* v. *Itseng,* 292 S. W. 170 (by Tex. Com. App.); *Butcher* v. *Case Threshing Machine Co.,* 207 S. W. 980 (by Tex. Civ. App.); *Becker* v. *Cooper,* 22 S. W. (2d) 1083 (by Tex. Civ. App).

The statutory trustees of the Beaumont Export & Import Company, after it became defunct, that is, after the expiration of the three-year period that its corporate existence was extended by the Texas statute, authorized the attorney, Bailey, who had been representing the corporation in the said cause pending in the California court, to enter their appearance in said court by filing a motion to set aside the judgment in the name of the said corporation, and either negligently or fraudulently failed to make known to the California court or to Montes' attorneys that the said corporation was defunct; *and by so doing, the said statutory trustees became in lieu of the corporation the actual movants in the litigation in the cause, and they are estopped to assert the contrary*: *Gamer Co.* v. *Gammage,* 241 S. W. 736 (Tex. Civ. App.); *Droege* v. *Emery,* 105 S. W. 374 (by Kentucky Ct. App.). These cases are directly in point. In Gamer Company vs. Gammage, Gamer continued to defend a damage suit against the Gamer Company after that company had been dissolved and after the expiration of the three-year period following its dissolution, and after a period of about eleven years had elapsed and plaintiff's cause of action for damages was barred by limitation as against every-

one except the Gamer Company, the said Charles Gamer then made it known to the court and opposing attorneys that said corporation had been dissolved, and plaintiff then made him a party defendant, whereupon he set up the defense of two-year limitation. The Texas court held that he was estopped to make such a contention; and that as the Gamer Company was non-existent for any purpose after April 28, 1913, it was evident that the defense of the suit was not carried on by the corporation after that date; that it must have been carried on by someone in its name; and that Charles Gamer, who owned practically all of the stock of the company at the time it was dissolved, was the only person interested in carrying on the efense of the suit. The Texas courts cited with approval the Kentucky case, *Droege* v. *Emery, supra*, which is similar in all respects, except only that in the Kentucky case the cause of action was prosecuted to a finality against the dissolved and incompetent corporation, while the Droeges and officers and stockholders of the corporation were in fact defending the suit throughout in the name of the corporation, etc. *In the case at bar this estoppel against the statutory trustees was specially plead* (paragraph 11 of petition, R. 11; paragraph 12 of petition, R. 11, 12; paragraph 13 of petition, R. 12).

Prior to the time the said corporation became defunct, to wit, before the 15th day of September, 1933, said Bailey, as authorized attorney of the corporation, requested and was granted by the court two continuances of the hearing on the motion filed by Montes for an order of the court to enter the default of the cross de-

fendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the cross-complaint, a true copy of which was served upon Bailey. *The legal effect of these continuances granted at Bailey's request was that the Beaumont Export & Import Company and its statutory trustees thereby waived all alleged defects in the original service.* The Texas courts so hold: *Early v. Cornelius,* 39 S. W. (2d) 6 (by Texas Sup. Ct.); *Early v. Cornelius,* 24 S. W. (2d) 757 (by Texas Ct. Civ. App.) *This waiver was expressly alleged* (paragraph 5 of petition, R. 4, 5).

It was also expressly alleged in the petition that with respect to the estoppel and the waiver above mentioned, the laws, jurisprudence and decisions of the courts of last resort of the States of Texas and California are the same (paragraph 14 of petition, R. 13).

POINT FIVE.

In attempting to evade and circumvent the legal effect of the allegations of the petition pleading *res judicata* and estoppel, as aforesaid, and in wilfully refusing to adjudicate said issue, and in attempting to put a different construction upon the California statutes prescribing service on a cross-action from that established by the California courts of last resort, the Texas courts have clearly failed in their duty to give the California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States.

As heretofore shown, the petition plead the California statutes relating to service on a cross-action and alleged that *the California courts had construed the said statutes to mean that a cross-action is a pleading in the case, and that serving on the adverse attorney of record of a copy of the cross-action and notice of the filing*

thereof is proper and adequate service. This is the holding in the following California cases: Lowe v. *Superior Court,* 134 P. 190, 165 Cal. App. 708 (S. Ct. of California); *Wood* v. *Johnston,* 8 Cal. App. 258, 260; *Ritter* v. *Braash,* 11 Cal. App. 258, 104 P. 592; *Farrar* v. *Steenbergh,* 173 Cal. Rep. 94, 159 P. 707.

In *Wood* v. *Johnson, supra,* the California court construed the California statutes here involved as follows:

> "Section 442, Code of Civil Procedure, as amended by act approved March 20, 1907 (Stats. 1907, p. 706), provides that 'whenever the defendant seeks affirmative relief against any party to the action,' etc. (the amendment consists in adding the last three words italicized after the word 'party'), he may, in a proper case, file a cross-complaint, which must be served upon the parties affected thereby. There is nothing contained in the section which indicates how the service may be made upon such party. By reference, however, to Section 465, Code of Civil Procedure, we find that 'all pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party, or his attorney.' *By the express provisions of Section 422, Code of Civil Procedure, as amended by act approved March 20, 1907* (Stats. and Amendts. to Codes, 1907, p. 705), *the cross-complaint is designated as a pleading on the part of the defendant. This being true, it follows that the service is sufficient under said Section 465 if made upon either the adverse party or his attorneys.* In the case at bar, the written acknowledgment of service of the cross-complaint indorsed thereon and signed by plaintiffs' attorney is sufficient proof of due service of the cross-complaint, and warranted the entry of default and conferred upon the court jurisdiction to render the judgment thereon."

The petition alleges not only the laws of California relating to proper service on a cross-action, but alleges how these statutes have been construed by the highest California courts, and, therefore, the courts of Texas are bound by these allegations unless the evidence adduced upon the trial on the merits should show otherwise: *Hanley* v. *Donoghue,* 116 U. S. 1, 6 S. Ct. 242; *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562 (by Com. App. of Texas); *Mitchell* v. *San Antonio Public Service Co.,* 35 S. W. (2d) 140 (by Tex. Com. App.).

The full faith and credit clause of the constitution requires that the judgment of a state court, which had jurisdiction of the parties and of the subject-matter in suit, shall be given, in the courts of every other state, the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits: *Roche* v. *McDonald,* 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365; *Hanley* v. *Donoghue,* 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; *Fauntleroy* v. *Lum,* 210 U. S. 231, 28 Sup. Ct. 641, 52 L. Ed. 1039; *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716.

With respect to the finality of the California judgment, respondent admitted in the Texas courts that under the laws of California the said judgment was final and that the laws of that state controlled as to this issue: *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562 (by Com. App. of Texas); Volume 3, Freeman on Judgments (5th Ed.), Section 1391, page 2873.

A default judgment or decree of another state is equally conclusive as to the rights thereby adjudicated as any other kind or class of judgment: *Ellis* v. *Mills,* 28 Texas 584; *Allen-West Commission Co.* v. *Gibson* (Tex. Civ. App.), 228 S. W. 342; *Fred Miller Brewing Co.* v.

Capital Ins. Co.; 11 Iowa 590, 82 Am. St. Rep. 579, 82 N. W. 1023; Volume 2, Freeman on Judgments (5th Ed.), Section 663, at page 1393; Volume 3, Freeman on Judgments (5th Ed.), Section 1361, at page 2805.

POINT SIX.

The substantive rights and liabilities of a dissolved corporation are determined by the laws of the state of its creation; but the method or manner of obtaining service upon a dissolved corporation, as well as making service on all other defendants, is determined by the law of the forum.

It is not the substantive law of California as to liability of dissolved corporations that controls the judgment here sued on, but the substantive law of Texas controls the validity of the California judgment, for the reason that the pleadings in the California court show that the Beaumont Export & Import Company was a Texas corporation. *Ferguson McKinney Dry Goods Company* v. *Garrett*, 252 S. W. 739 (by Texas Com. App.); reversing judgment (Tex. Civ. App.) 235 S. W. 245; *Seth* v. *Lew Hing* (Cal.), 14 Pac. (2d) 537 (holding that in winding up affairs of a corporation the laws of its creation control); *Illinois Power & Light Corporation* v. *Hurley*, 49 F. (2d) 681, and cases cited; *Wettentel* v. *Robinson*, 136 Atl. 673 (Sup. Ct. 1927); *Kelley* v. *International Clay Products Co.*, 140 Atl. 143 (Sup. Ct. of Pennsylvania, 1928).

Though the cross-action was filed after the Beaumont Export & Import Company was dissolved (but before it was defunct), without notice to Montes or his attorney or to the court of such dissolution, *the proper manner or method of service of process on the cross-action against the said dissolved corporation must be determined by the*

California laws and not by those of Texas. Volume 3, Conflict of Laws by Beale, Section 589.1; Volume 3, Freeman on Judgments, Section 1454, at page 2992.

In the citation to Volume 3, Conflict of Laws by Beale, *supra,* the rule is stated as follows:

> *"The proper method of service of process is determined by the law of the forum. Each state has the right to prescribe by law how its citizens shall be brought into its courts. Harrymore and Schriver* v. *Roberts,* 53 Md. 64, 75."

In Freeman on Judgments, *supra,* the rule is stated in the text as follows:

> "Subject to the limitations of the federal constitution, the validity of service of process is determined by the law of the state where the judgment was rendered. *Lincoln Safe Deposit Company* v. *Continental Life Insurance Company* (Mo. App.), 249 S. W. 677. Hence, in an action upon a foreign judgment a defendant attacking the sufficiency of service of process by a person not an officer, must show that by the foreign law such service conferred no jurisdiction. *Robinson* v. *Freeman,* 236 Mass. 446, 128 N. E. 718."

California Statutes Relating to Dissolved Corporations, Extension of Corporate Existence, Etc.

The California statutes extending for certain purposes the corporate existence of dissolved corporations were not plead, for the reason that the substantive rights and liabilities of the Beaumont Export & Import Company, as a Texas corporation, were to be determined by the Texas and not by the California laws.

But the special California statute prescribing the method of making service on a dissolved corporation,

with respect to a cross-action is substantially the same as that prescribed by general statute for making service on all other defendants. This section is 402a, Civil Code, of the tenor following:

> "Summons or process against a dissolved corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of dissolution was, an agent for service of process."

It would appear from the provision "at the time of dissolution was an agent for service of process," that the attorney, Bailey, under the allegations of the petition, would constitute such a person; *and, consequently, the service of process on him, who was the attorney of record for the Beaumont Export & Import Company at the time of its dissolution, would be in strict compliance with said statute.*

The petition (paragraph 22, R. 17) *alleged that the manner or method of service on a cross-action, as prescribed by the California statutes, was reasonable, inherently just and afforded an opportunity to adverse parties to be heard and to have "their day in court."*

The California statutes extending the corporate life of dissolved corporations are shown in verbatim copies thereof in the Appendix. There is no substantial difference between the California and the Texas statutes on this subject, *except only that the California law places no limit on the period of the extension, while the Texas statutes limit the extended period to three years.*

The first or original California statutes thus extending the corporate existence of a dissolved corporation went into effect in 1929 and were amended in 1931 and 1933; and the original statutes and the amendments

thereto and the special statute relating to service on a dissolved corporation are copied verbatim in the Appendix.

The case of *Nezik* v. *Cole*, 184 Pac. 523, was relied on by respondents in the state courts to support their contention that the Beaumont Export & Import Company upon its dissolution could no longer sue or be sued and served with process in California, as was the rule under the common law; *but that case was tried and decided by the California courts a few years before 1929, when the above mentioned California statute changed the common law rule. Therefore, the case cannot now be in point even if the California law controlled.*

It is a general principle—and the rule obtains both in Texas and California—that if there is no pleading and proof of the applicable laws of a sister state, there arises a presumption that the laws of the sister state, whether statutory or common law, are the same as those of the forum. *Abercrombie* v. *Stillman*, 77 Tex. 589, 14 S. W. 196; *James* v. *James*, 81 Tex. 573, 16 S. W. 1087; *Bradshaw* v. *Mayfield*, 18 Tex. 28; *Porcheler* v. *Bronson*, 50 Tex. 555.

Applying this established rule, the California court, in adjudicating the cross-action against the Beaumont Export & Import Company, could and should properly have presumed that the law of Texas extending the life of corporations for the purpose of suing and being sued, etc., (there being no pleading nor proof of the laws), was the same as the California statutes on the subject then in force; and such presumption would thus have been in accord with actual fact.

Respectfully submitted,

M. G. Adams,
Counsel for Petitioner.

APPENDIX.

The following are verbatim copies of the Texas statutes involved and being a part of the Revised Civil Statutes of Texas for 1925.

Jurisdiction of Supreme Court.

Art. 1728. Appellate Jurisdiction. The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the state.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error, where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error.

Art. 1729. Writ of Error or Certificate. All causes mentioned in the preceding article may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, but the Court of Civil Appeals may certify any question of law arising in any such case at any time they may choose, whether before or after the decision of the case in said court.

Art. 1739. Good Cause to be Shown. The Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter re-

quired, the sufficiency of such cause to be determined as herein provided.

Art. 1740. Petition for Writ of Error. A writ of error before the Supreme Court may be applied for by petition addressed to said court and the petition shall contain such other requisites as may be prescribed by the Supreme Court; provided that said petition shall be sufficient if it complies with the requirements of Article 1741.

Art. 1741. Requisites of Application. In all cases taken to the Supreme Court by writ of error it shall be sufficient if the petition for the writ of error shall contain the following:

(1) A brief statement as to the nature and result of the suit in the Court of Civil Appeals.

(2) Specifying briefly the particular grounds and/or ruling or rulings of the Court of Civil Appeals on which the error is based, with such statements from the record as are necessary to show that same was erroneous and was material to the decision.

(3) The authorities relied on, if any.

(4) A statement and/or argument on the errors for which relief is sought.

Provided that more than one question may be presented in the same petition; and further provided that the Supreme Court may adopt rules with reference to writ of error procedure, but not inconsistent with the provision of this Act or any other statute.

Art. 1742. Filing. The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing.

Art. 1743. Petition With Record. The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs in the suit.

Art. 1757. Briefs. In all cases appealed to the Court of Civil Appeals and/or taken to the Supreme Court, it shall be sufficient if said briefs contain the following:

1. A statement as to the nature and result of the suit.

2. The alleged error or errors upon which the appeal is predicated.

3. The authorities relied upon.

4. A statement and/or argument on the errors assigned. Provided, however, that the Supreme Court may adopt rules with reference to the form and time of filing of briefs generally, but not inconsistent with the provisions hereof.

Art. 1762. Motion for Rehearing. A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of entry of the judgment or decision of the court, and not later. Should the court adjourn within less time than fifteen days after the rendition of the judgment, it may make such rules and regula-

tions with reference to the filing of the motion as it may deem proper. The grounds relied upon for the rehearing shall be distinctly specified in the motion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record.

Jurisdiction of Court of Civil Appeals.

Art. 1819. Jurisdiction Defined. The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed one hundred dollars exclusive of interest and costs.

Art. 1821. Judgment Conclusive on Law. The judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from Supreme Court in the following cases, to-wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute, or cases involving conflicts between decisions of the Courts of Civil Appeals or between a decision of a Court of Civil Appeals and a decision of the Supreme Court.
2. All cases of slander.
3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts, except where appellate jurisdiction is given to the Supreme Court, and not made final in said Courts of Civil Appeals.

Art. 1844. Assignments of Error. The appellant or plaintiff in error need not file assignments of error with the clerk of the court below, but he may embody in his brief in the appellate court all assignments of error distinctly specifying the grounds on which he relies. All errors not distinctly specified are waived, but an assignment shall be sufficient which directs the attention of the court to the error complained of. The appellee or defendant in error need not file his cross-assignments of error with the clerk of the court below but may embody them in his brief filed in the appellate court.

Art. 1846. Appearance by Brief, etc. The attorneys for both the plaintiff and defendant may file written, typewritten or printed briefs or argument, if written not to exceed fifteen (15) pages; and the court shall be required to notice the same as if it were the personal appearance of the attorney, and shall not dismiss any suit or cause where such brief or argument is filed with the papers for want of further prosecution. Said briefs shall be sufficient if they comply with the requirements of Article 1757.

Art. 1877. Motion for Rehearing. Any party desiring a rehearing of any matter determined by any Court of Civil Appeals, may, within fifteen days after the date of entry of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, file with the clerk of said court his motion in writing for a rehearing thereof, in which the ground relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party if known, and if not known, then the name and residence of the opposing party as shown in the record. If the court adjourns within less than fifteen days after the rendition of the judgment, the motion may be made at such time and in such manner as may be prescribed by rules to be made by the Supreme Court.

Art. 1881. Filing Copy of Application. When an application for a writ of error from a Court of Civil Appeals to the Supreme Court is filed in the Court of Civil Appeals, the applicant shall at the same time deposit with the clerk of said Court of Civil Appeals a true copy of the application and shall notify the attorney of record of the defendant in error of the deposit of said copy.

Art. 1883. Forward to Supreme Court. When a petition for a writ of error to the Supreme Court is filed with the clerk of a Court of Civil Appeals, he shall note upon his record the filing of said petition, and promptly forward the same to the clerk of the Supreme Court with the original record in the case and the opinion of the Court of Civil Appeals, the motions filed therein, certified

copies of the judgment and orders of the Court of Civil Appeals, and a copy of the appeal or the supersedeas bond of the plaintiff in error.

Dissolution of Corporations.

Art. 1388. Liquidation by Officers. Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.

Art. 1389. Extension of Existence. The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of

enabling those charged with the duty to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

Art. 1390. Effect of Dissolution. The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved.

Art. 1391. Suit on Claim. When no receiver has been appointed for said corporation, suit may be instituted on any claim against said corporation, as though the same had not been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved, and judgment may be rendered as though the corporation had not been dissolved, and the assets of said corporation shall be liable for the payment of such judgment as if said corporation had not been dissolved.

Art. 1392. May Sue Stockholders. If a corporation, except a railway, charitable or religious corporation, be dissolved leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution without joining the corporation in such suit; and if judgment be rendered and execution satisfied, any defendant may sue all who were

stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable.

Art. 1393. Apportionment of Debt. Execution upon such judgment shall direct the collection to be made from the property of each stockholder respectively. If any number of stockholders-defendants in the case shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.

Art. 1394. Forced Apportionment. Any stockholder who pays more than his due proportion of any debt of the corporation may, by suit, compel contribution from the other stockholders.

California Statutes Relating to Dissolved Corporations

ORIGINAL LAW OF 1929.

Civil Code, Sec. 399. Powers of corporation after dissolution. All corporations, whether they expire by their own limitation, by forfeiture of charter by order of court, or otherwise dissolved, shall nevertheless continue to exist for the purpose of winding up their affairs, prosecuting and defending actions by or against them, and of enabling them to collect and discharge obligations, to dispose of and convey their property, and to collect and divide their assets, but not for the purpose

of continuing the business for which the corporation was established.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the persons who could have been entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly.

Before the payment of any part of the capital and before beginning the business for which the corporation was created, the incorporators named in any articles of incorporation may dissolve the corporation by filing in the office of the secretary of state a certificate, verified by the oath or affirmation of a majority of the incorporators named in the articles of incorporation, that no part of the capital has been paid and no debts are unpaid, and thereupon the said corporation shall be dissolved.

Civil Code, Section 400. Unless other persons are appointed by the court, the directors or managers of the affairs of the corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation.

1931 AMENDMENT.

Section 399, Civil Code: Continuation of corporation after dissolution. All corporations, whether they expire by their own limitation, by forfeiture of existence by order of court, or are otherwise dissolved, shall nevertheless continue to exist for the purpose of winding up their affairs, prosecuting and defending actions by

or against them, and of enabling them to collect and discharge obligations, to dispose of and convey their property, and to collect and divide their assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or proceedings to which a corporation is a party shall abate by the dissolution of such corporation.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly (added by Stats. 1931, p. 1821).

1933 AMENDMENT.

Section 399. Continuation of corporation after dissolution. (A corporation which is dissolved by the expiration of its term of existence) by forfeiture of existence by order of court, or otherwise (nevertheless shall) continue to exist for the purpose of winding up (its) affairs, prosecuting and defending actions by or against (it) to collect and discharge obligations, dispose of and convey (its) property, and ( ) collect and divide (its) assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or (proceeding) to which a corporation is a party shall abate by the dissolution of such corporation (or by reason of proceedings for dissolution and winding up thereof).

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation

for the benefit of the persons entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly. (In effect 90 days from and after May 22, 1933. Sec. 1a, Art. IV, Const.; Stats. 1933, Chap. 533.)

Service on Dissolved Corporation.

Section 402a, Civil Code:

Summons or process against a dissolved corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of dissolution was, an agent for service of process. If no such person can be found, summons or process may be served upon the dissolved corporation by delivering a copy thereof to the Secretary of State or an assistant or deputy Secretary of State.